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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 111

JULES FOND,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

E. AVERY CRABY,
Suite 700,
612 South Flower Street,
Los Angeles 17, California,
Attorney for Respondent.

MESERVE, MUMPER & HUGHES,
ROBERT A. STEWART, JR.,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF IN OPPOSITION.

The Opinion Below.

The opinion of the Court of Appeals has not yet been reported. There was no opinion by the District Judge (Honorable Ben Harrison).

Jurisdiction.

Judgment of the Court of Appeals affirming judgment of the District Court dismissing petitioner's first amended complaint for damages for defamation on motion of respondent under subdivision 6 of Rule 12(b) F.R.C.P. was entered April 1, 1958 [R. 43]. There was no petition for rehearing. Jurisdiction of this court under 28 U. S. C. A., Section 1254(1) has been invoked by petition for certiorari filed July 17, 1958.

Statutes.

The following provisions of the Civil Code of the State of California regarding actionable defamation are relevant:

California Civil Code, Section 44:

"§44. *Defamation, what.* Defamation is affected (effected) by:

1. Libel;
2. Slander."

California Civil Code, Section 45:

"§45. *Libel, what is.* Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

California Civil Code, Section 45a:

"§45a. (*Libel on its face: Definition: Defamatory language not libelous on its face, when actionable.*) A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

California Civil Code, Section 47:

"§47. (*Privileged publication or broadcast: What constitutes.*) A privileged publication or broadcast is one made—

"3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

* * * * * * * *

California Civil Code, Section 48:

"§48. (*Same: When malice not inferred.*) In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication."

Question for Review.

The single question presented is whether under applicable state law the letter set out hereinafter can be the basis of an action for libel on the extrinsic facts alleged in the first amended complaint.

Statement of the Case.

The facts of the case are taken as they appear from the allegations of the first amended complaint [R. 3-15], which is abstracted in the opinion of the Court of Appeals [R. 36]. Briefly, petitioner Pond (plaintiff and appellant below) left the employment of International General Electric Company (I. G. E.)[1] in 1950, taking with him a service letter [R. 15-18], summarizing his record over a period of 17 years in generally complimentary terms, except for the statement that he had resigned be-

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[1]Then a subsidiary, now a division of respondent, General Electric Company.

cause he believed his prospects with the Company were unsatisfactory. Pond has never expressed dissatisfaction with this letter, although it said nothing about his honesty, integrity, loyalty to the United States, or desirability as a security risk.

Six years after his employment by I. G. E. had terminated, Pond (who by this time was a resident of California) applied for work in California, using the service letter as a reference. Four prospective California employers addressed routine inquiries to International General Electric. Each received in reply a letter [R. 19] in form as follows, which Pond has attempted to make the basis for a libel suit, alleging [R. 6-7] the statements here italicized to have been false:[2]

> "This is in reply to your letter of March 12 in which you request information concerning Mr. Jules S. Pond.
>
> *"The official in International General Electric to whom Mr. Pond reported passed away several years ago,* and *I am unable to give you first-hand information concerning him.* His personnel record with the Company indicates that he had approximately 17 years of service in the International General Electric family. His initial engagement was with General Electric S.A., Argentina. During the early 40's he came to the United States of his own volition, seeking opportunity for engagement here while in the process of securing naturalization as a U. S. Citizen. He was hired by International General Electric after

[2]Pond states (Pet. 5) that the last sentence was also alleged to have been false, but the statement is not convincing [Cf. Par. VII, R. 6, specifying statements in said letter alleged to be false with Par. XIII, R. 9], nor did Pond file a petition for rehearing.

his arrival in the United States, and was assigned to our Air Conditioning and Refrigeration Department. Our records further indicate that he submitted his resignation on August 9, 1950, which was accepted by mutual agreement.

"Insofar as I can determine from his records, we would not be prepared to consider him for re-engagement.

Very truly yours,
CHARLES MENTZER
Specialist—Personnel"

The first amended complaint alleges that I. G. E. in 1950 had agreed to repeat the details of the service letter on occasion [R. 5], and further alleges that by reason of certain silences and omissions of the reply letters, in the understanding of the recipients petitioner stood accused of dishonesty, disloyalty, incompetence and forgery of the service letter [R. 7-9].

On motion of respondent under subdivision 6 of Rule 12(b) F. R. C. P., petitioner's first amended complaint was dismissed when he declined leave to further amend, the court finding [R. 29]:

> "That the facts as alleged in plaintiff's first amended complaint and claim do not establish or provide an interpretation of the letters alleged to have been maliciously sent by defendant company beyond the natural sense of the published words and that said letters in light of the extrinsic facts alleged are not fairly suspectible of the defamatory meaning sought to be attributed to them . . ."

The Court of Appeals affirmed [R. 43]. It is to be noted that on its own motion the Court of Appeals ordered

a supplemental transcript [R. 34] and had before it all the portions of the record not theretofore transmitted, thus treating the motion to dismiss as a motion for summary judgment under Rule 12(b) F. R. C. P.

This is a libel suit. Petitioner's problem is instantly apparent. The reply letters are simply not defamatory, and contain no material false statement. Such statements as were allegedly false are not defamatory on any state of facts which could conceivably be alleged. Pond's real grievance is not that the reply letters were defamatory, but that (in his opinion) they did not constitute favorable letters of recommendation. His complaint is not that I. G. E. said anything bad about him, but that it failed to say something good.

The inherent defect of petitioner's case is that he has not stated, and is not able to state, a cause of action for libel. He has attempted to gloss over this in several ways. He has persistently asserted a perpetual duty on the part of I. G. E. as a former employer to furnish an exhaustive reply and favorable recommendation in response to inquiries from prospective employers, as if the action were one for specific performance or breach of contract. Petitioner's principal contention now seems to be that by the judgment below he has been deprived of his day in court and some amorphous civil liberty or constitutional right thereby infringed. The fact is, however, that petitioner has pleaded such extrinsic facts and circumstances as he contends makes the reply letters actionable defamation. The same were duly considered by the District Judge [R.

29] and by the Court of Appeals [R. 39]. Petitioner declined the opportunity to allege such other extrinsic facts as might have occurred to him [R. 29]. As the Circuit Judge said [R. 41]: "Pond confessed that he had no further facts to add by allegation when he refused to plead further." He was at all times represented by counsel.

Petitioner's claim that his employer of six years past was bound by contract or duty to give him a more favorable recommendation may be asserted in his other action[3] pending in the same court before the same judge, in which on the same facts he complains on the theories of negligence and breach of contract.[4] On his libel action, he has had his day in court, but he has no case. Again in the words of the Circuit Judge [R. 39]:

> "It is unquestionable that a cause of action in libel is attempted. The pleader was no novice. Technically, the pleading is excellently done. But a cause of action is not stated. None could be stated."

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[3] *Pond v. General Electric Company*, No. 19870-BH Civil, United States District Court, Southern District of California, Ceneral Division.

[4] This circumstance was properly brought to the judicial notice of the Court of Appeals (App. Br. 8). *Yudin v. Carroll*, 57 Fed. Supp. 793 (W. D. Ark. 1944); *Kithcart v. Metropolitan Life Ins. Co.*, 62 Fed. Supp. 93 (W. D. Mo. 1944), aff'd 150 F. 2d 997, cert. den. 326 U. S. 777, rehear. den. 326 U. S. 812, rehear. den. 327 U. S. 813; *Lowe v. McDonald*, 221 F. 2d 228 (9th Cir. 1955); *Morse v. Lewis*, 54 F. 2d 1027 (4th Cir. 1932); *Ellis v. Cates*, 178 F. 2d 791 (4th Cir. 1949); *Keith v. Endicott Johnson Corp.*, 75 F. 2d 249 (2nd Cir. 1935); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F. 2d 60 (2nd Cir. 1934).

ARGUMENT

I.

No Federal Question Is Presented.

The jurisdiction of the District Court rested upon diversity of citizenship, petitioner being a citizen and resident of the State of California, and respondent a New York corporation [R. 3]. The action is for libel. The letters of which petitioner complains were published in California. The case is governed by the law of the State of California pertaining to libel as expressed in its statutes and decisions. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188; 28 U. S. C. A., Sec. 1652; *Gaig v. Hughes*, 111 Fed. Supp. 27 (S. D. Cal. 1953); 30 Cal. Jur. 2d 684.

II.

The Judgment Below Accords With Controlling Decisions on the State Law of Libel.

The Supreme Court and the intermediate appellate courts of the State of California have consistently held that it is the duty of the trial judge to determine whether or not, in the light of the extrinsic circumstances alleged, the language of a publication is reasonably capable of the defamatory meaning attributed to it by a pleaded innuendo. They have further held that where a communication is phrased in ordinary language which is clear and unambiguous, no innuendo can ascribe to it a meaning different from the plain meaning which the words naturally bear. If the trial judge finds that, on the extrinsic facts alleged, the language is not reasonably susceptible of defamatory meaning, the action should be dismissed.

30 Cal. Jur. 2d 723-724:

"Where the allegedly defamatory language is in the vernacular of the place of publication, it will be assumed that those who heard or read it understood it in the sense which properly belongs to it. Under such circumstances, the common import of the words must be applied to test its defamatory character. There is no room, in such a case, for the introduction of evidence of witnesses as to their understanding of the language."

31 Cal. Jur. 2d 54:

"It is not in the nature of an innuendo to beget an action, nor is that its purpose. Unless the words used can reasonably be understood in a defamatory sense, the innuendo cannot aid the pleader. Nor can an innuendo be used to give the words charged as defamatory an unnatural or forced meaning. It cannot ascribe to defamatory matter a meaning broader than the words actually used naturally bear, or broader than they bear when read in the light of the inducement. In other words, an innuendo cannot add to, enlarge, extend, or change the natural sense of the published words."

Mellen v. Times-Mirror, 167 Cal. 587, 593, 140 Pac. 277, 279 (1914):

"It cannot be disputed that it is for the court to determine whether, in the light of such extrinsic facts as are alleged, the writing can be a libel. If, in the light of such extrinsic facts, the article is not fairly susceptible of the defamatory meaning sought to be attributed to it, the complaint fails to state a cause of action. Of course, if the language of the article is capable of two meanings, one of which is harm-

less and the other libelous, and it is alleged that the same was used and understood as conveying the latter meaning, a cause of action is stated, and it is the province of the jury to determine in which sense the language was used and understood by the readers of the article. 'But it is for the judge to determine whether the language used is capable of the defamatory meaning claimed for it by the plaintiff. (See *Van Vactor v. Walkup*, 46 Cal. 124, 133.)"

Bates v. Campbell, 213 Cal. 438, 442-443, 2 P. 2d 383, 385 (1931). Here the court declined to construe a general reference to a discharged employee's record as implying unfitness for the position held.

Emde v. San Joaquin Labor Council, 23 Cal. 2d 146, 159, 143 P. 2d 20, 28 (1943). The California Supreme Court here held that the statement that a dairy had violated its union contract did not permit the innuendo that the dairy was dishonest.

Chavez v. Times-Mirror, 185 Cal. 20, 25, 195 Pac. 666, 669 (1921). The California Supreme Court here held that the statement that a certain instance called for investigation by the State Bar Association was not capable of meaning that the attorney in question was unprofessional or corrupt.

Vedovi v. Watsan & Taylor, 104 Cal. App. 80, 87, 285 Pac. 418, 422 (1930). The District Court of Appeal held that a notice cancelling an insurance policy for nonpayment of premium was incapable of meaning that the premium had been misappropriated by the agent who allegedly had collected it.

Hearne v. De Young, 119 Cal. 670, 678, 52 Pac. 150, 153 (1898). The publication of a newspaper article re-

ferring to a murder, and stating that the plaintiff had been the family doctor and one of the first to arrive on the scene, was held not to permit the innuendo that the plaintiff was implicated in the murder.

The judgment of the Court of Appeals is entirely consistent with its prior decision applying California libel law in *Lorentz v. R. K. O. Radio Pictures*, 155 F. 2d 84, 87 (9th Cir., 1946).

III.

The Judgment Below Does Not Conflict With Decisions in Other Circuits or With Decisions of This Court.

The case upon which petitioner principally relies (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817) holds only that a complaint which states a cause of action for defamation should not be dismissed. Such holding in no way conflicts with the decision below, the petitioner here having failed to state a cause of action under applicable state law.

Other cases cited (Pet. 3) as in conflict do not involve California law, and appear to be wholly irrelevant. *Erick Bozeman Remedy Co. v. Jensen Salsbery Laboratories*, 17 F. 2d 255 (8th Cir. 1926), affirmed the dismissal of a complaint for libel which did not sufficiently allege special damages. *Baker v. Warner*, 231 U. S. 588, 34 S. Ct. 175, 58 L. Ed. 384, is entirely consistent with the decision below and with California statutes and decisions, for the court said (231 U. S. at 594), immediately preceding petitioner's quotation (Pet. 7):

> "Where the words are libelous *per se* the judge can so instruct the jury, leaving to them only the determination of the amount of damages. Where the

words are not libelous *per se*, and, in the light of the extrinsic facts averred, could not possibly be construed to have a defamatory meaning, the judge can dismiss the declaration on demurrer, or, during the trial, may withdraw the case from the jury."

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

E. Avery Crary,

Meserve, Mumper & Hughes, and

Robert A. Stewart, Jr.,

Attorneys for Respondent.